

**WHITEPAPER:  
SUPERSTORM SANDY EMERGING COVERAGE ISSUES**

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On October 29, 2012, the enormous storm known as Superstorm Sandy struck a wide swath across the eastern United States. The storm struck the New York and New Jersey area with tremendous force, causing loss of life and property. We focus upon some of the many issues that will be of concern to insurers in the coming weeks and months as they address thousands of claims that are expected in the wake of this historic storm.

**Addressing the “wind/water” conundrum**

On October 29 and 30, 2012, a powerful combination of multiple weather systems and tidal forces known as “Superstorm Sandy” battered the coastal counties of New York, the long coast line of New Jersey, and miles of inland territory in those and other surrounding states. Many weather experts began calling Sandy a “perfect storm” even before it even made landfall.<sup>1</sup> The massive storm made land near Atlantic City, New Jersey, as a “post-tropical cyclone” that coincided with a full moon to exacerbate already high tides. Powerful winds and heavy rains combined with a record breaking storm surge to inundate low-lying areas for hundreds of miles, including some of the most densely-inhabited areas and heavily-used infrastructure in the United States. Matters were only

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<sup>1</sup> Superstorm Sandy was downgraded from a tropical storm to a post-tropical storm cyclone before it made landfall in New York or New Jersey. The Governor of New Jersey, pursuant to Executive Order No. 107, has declared it a violation for any insurer to apply a mandatory or optional hurricane deductible *to the payment of claims for property damage* attributable to Sandy. The Governor of New York issued a press release announcing that New York *homeowners* will not have to pay hurricane deductibles on insurance claims stemming from damage caused by Sandy and the New York State Department of Financial Services has informed the insurance industry that hurricane deductibles should not be triggered.

made worse a few days later when the region was struck again this time by a “Noreaster” with colder temperatures that dropped a thick wet snow across the affected areas before relief had come to many of those effected by Sandy.

Today, the thousands of people and businesses who suffered damage to their property are asking what recovery will be available under their insurance policies. For those without flood insurance, or for those who need to place claims under multiple policies, Sandy’s combination of wind, rain and water raises causation issues that insurers will need to address in a timely and consistent way. As storms of this nature and magnitude are uncommon in the New Jersey/New York area, there is little case law precedent upon which insurers may rely.

New Jersey precedent is based upon case law that is nearly one hundred years old. In Newark Trust Co. v. Agricultural Insurance Co., decided in 1916, the court addressed a claim for property damage to a beach-front home incurred under circumstances that are similar to Sandy in many ways. In that case, a Standard Tornado policy covered a frame dwelling built upon a brick foundation. The home was protected from the ocean by a timber bulkhead built fifty feet in front of it. "Return bulkheads," ran back to protect the house from the side wash of the sea. This bulkhead space was filled with sand and was used as a lawn. The home fell victim to a storm that lasted three days, with hurricane-force winds and unprecedented high tides. With the first flood tide, the wind “caused the sea to come in and come up to and against the main bulkhead, forcing the planks off and knocking it out in front, and also caused the sea to reach around the south end of the bulkhead, cutting away the sand and washing it out. As this tide began to fall, ‘it left about eighteen inches of sand next to the house where the brick foundation was, but the

wind blew so hard that it shook the house and the front of the foundation tumbled down and caused the house to go about 35 degrees angle down; then the tide fell, and it stayed there until the next tide.” A second flood tide “swept around the bulkheads, further washed away the sand, and finding the house in its fallen position, broke it apart and carried it to sea.”

The Tornado policy provided windstorm coverage, but not for loss or damage occasioned directly or indirectly by or through any ... high water ... nor any consequential loss of any kind” or “loss or damage caused by water or rain, whether driven by wind or not.” The policy holders argued that, since the wind caused the water to rise, this should fall under its windstorm protection. The court determined that, while the wind did lift the water, the home was destroyed by water, not wind. Therefore, there was no coverage. Newark Trust is still cited as support for rejecting claims that damage may be covered when water is driven by wind rather than normal tidal forces.

Another claim involving a wind/water causation question was presented in another New Jersey decision, Newman v. Great American Insurance Company. That claim involved another beachfront home destroyed in a storm. The standard policy insuring the property extended coverage for windstorm, but excluded, “loss caused by, resulting from, contributed to or aggravated by ... flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not.” The court found the policy exclusion complex and ambiguous, but nevertheless affirmed a verdict in favor of the defendant insurer.

New York, has a large body of insurance law but little reported case law as it has been spared, for the most part, a catastrophic hurricane-like event until Sandy. This makes the task of evaluating coverage for hurricane-related events more difficult, but not impossible. For example, a 1987 case, Steve's Pier One, Inc., et al v. Insurance Co. of America, concerned water driven by wind that propelled objects through a damaged building. The court determined that this fell within the flood exception as water was the proximate cause for the damage.

In both New York and New Jersey, the courts will likely seek guidance from case law in jurisdictions such as Florida and Louisiana, where hurricanes have been more frequent events. Decisions from those states may shed light on the interpretation of policy language that has not been tested in New York or New Jersey. Consequently, insurers must act cautiously when relying upon such authorities, as they have no precedential value and may not receive due consideration.

### **Business Interruption claims following Superstorm Sandy: Looking at the elements**

Television news has depicted vividly the devastating damage Superstorm Sandy caused to buildings, automobiles and other property. However, given the benefit of time since the storm struck, it is likely that the storm's impact will be much greater in terms of lost business revenues, than direct property damage in the nation's largest city and its environs. Therefore, questions concerning applicable business interruption coverage will become more pressing in the weeks and months to come.

Before the storm had even passed, one industry figure observed, "The impact on the supply chain is going to be dramatic. Given the amount of commerce and

transportation that occurs in Sandy's corridor, and the location of five major ports in its path, this event is going to ripple across the entire U.S. economy.”<sup>i</sup> Economic losses to businesses have resulted from street closures, power outages, failed telephone service, suspension of utilities and transportation services, and countless other disruptions to everyday business life.

The standard Business interruption form contains the following insuring agreement:

We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration”. The “suspension” must be caused by direct physical loss of or damage to property at the premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

One commentator has explained, “Business interruption insurance protects a flow of income and returns the insured to the economic position that it would have occupied had its business not been interrupted. It compensates the insured for the actual lost earnings that the insured can reasonably show that it suffered as a direct result of the destruction of its business property and the resulting business interruption.”<sup>ii</sup>

The standard policy defines “suspension” as “the slowdown or cessation of your business activities; or that a part or all of the described premises is rendered untenable, if coverage for Business Income including “Rental Value” or “Rental Value” applies.” “Operations” are defined as “your business activities occurring at the described premises; and the tenantability of the described premises, if coverage for Business Income including “Rental Value” or “Rental Value” applies.” Many policies also include Extra

Expense, Civil Authority, Alterations and New Buildings, Extended Business Interruption, and Interruption of Computer Operations coverages.

In general, the standard policy language requires an Insured to establish five elements to recover a Business Interruption claim: 1) *A covered peril*; 2) *Causation of damage to covered property*, i.e., damage to the insured's property; 3) *Causation of a necessary suspension or interruption in the insured's business operations*, meaning something more than disappointing business results; 4) *Causation of a covered loss, such as actual lost income or extra expense*, or in other words, damage of the sort that the policy is intended to cover; 5) *Occurrence of the covered loss during the appropriate "period of restoration"*.

Even though New York City has not experienced a major wave of business interruption claims due to hurricane-like events in the past, it experienced an impactful disaster on September 11, 2001 as a result of terrorist attacks on the World Trade Center. That experience has provided a body of case law that provides guidance in determining whether the five business interruption elements are satisfied.

**a. Direct Physical Loss Caused by a Covered Cause of Loss** Many Superstorm Sandy claimants may have difficulty demonstrating direct physical loss to their own property in connection with the business interruption loss. Policy holders in a disaster zone may attempt to recover their business losses attributable to damage to uninsured property. As the World Trade Center cases show, courts are very reluctant to extend coverage in this way.<sup>iii</sup> Sandy may present especially vexing problems in situations where an insured's loss is caused by flood water damage to property nearby. Also, many claims may be derived from the loss of electrical power, heat, or

telecommunications services. Under other policy terms, these causes may be limited or even excluded from coverage.

**b. Suspension of Operations** Similarly, many Superstorm Sandy claimants will have endured punishing difficulties in conducting business, yet have no valid business interruption claim. “Suspension” requires more than a mere hindrance to business or inconvenience to customers or employees. Rather, it must be a “total interruption or cessation of business”. For example, in Royal Indemnity Co. v. Retail Brand Alliance, Inc.,<sup>iv</sup> the insured sought to extend business interruption coverage based upon damage to the World Trade Center, which lead to closure to one of its entrances and use of scaffolding in front of the insured’s premises. The Court held that there was no loss or destruction of, or damage to, the insured’s property. Suspension must also be total; a partial suspension will not be sufficient to support a claim. Insureds often argue that their business has been suspended to the extent that they are unable to function as before an occurrence. In another case, Broad Street, LLC v. Gulf Ins. Co.,<sup>v</sup> The Court held that the policy’s requirement of a “business suspension” meant that there had to be a “total interruption or cessation of operations”. That standard had been met during the period of September 11 to September 18, but not during the weeks and months after, when tenants were allowed to reside in their apartments. Moreover, there must be a causal nexus between the covered physical damage and the suspension of business operations.<sup>vi</sup>

**c. Actual Loss of Business Income** Superstorm Sandy claimants will need to demonstrate that their business income loss was causally related to the suspension of business. The loss cannot simply coincide with the suspension of business, it must be

caused by it. For example, in Abner, Herrman & Brock Inc. v. Great Northern Ins. Co.,<sup>vii</sup> the insurer argued unsuccessfully that the insured's losses were not covered by the policy because they were attributable to the closing of the stock market after 9/11, rather than the closure of the insured's offices. The court denied summary judgment to the insurer, finding that it could not say as a matter of law that the investment advisor did not incur business income loss due to the inability of its staff to work while civil authorities prohibited entry in the premises. Similarly, in Philadelphia Parking Authority v. Federal Ins. Co.,<sup>viii</sup> the court ruled that even though the insured had suffered business interruption and economic damages, none were covered by the policy. Rather, the court said, the economic damage had caused the business interruption.

**d. During the Period of Restoration** How Sandy claimants calculate their Periods of Restoration will vary from case to case. Sometimes the period is determined with regard to the insured's level of economic activity.<sup>ix</sup> In other cases, the period of restoration may depend on where the insured is physically situated, or even what property has been destroyed.<sup>x</sup>

**e. Calculating Loss of Earnings** Assuming that the insured submits a valid loss of business income claim, the final inquiry will be, how are damages to be determined? Determination of the Sandy claimant's Actual Loss will require a calculation based upon many factors beyond the length of the period of restoration. The insured must project what its sales would have been -- not just its production -- and involves judgments and assumptions that are bound to cause disagreement between an insurer and its insured. Courts will seek to avoid placing the insured in a better position than it would have been had the loss and business interruption not occurred. Numerous

issues can arise here, such as whether business losses may be offset against income gains during the same period.<sup>xi</sup>

### **Anti-Concurrent Causation Clauses in New Jersey and New York**

The effects of Superstorm Sandy throughout New York and New Jersey caused a substantial amount of damage (mainly) due to a combination of wind and flooding, especially at the New Jersey Shore and around the New York City metropolitan area. Due to these combined causes in areas where flood coverage is minimal, Sandy's effects will require property insurers to review and evaluate their respective anti-concurrent-causation clauses, or "ACCC." The typical ACCC contained in many property policies and which excepts damage caused by the concurrent harm of wind and water, reads:

We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in sequence with the excluded event to produce the loss ... as a result of any combination of ... water damage, meaning ... flood, surface water, waves, tidal water, tsunami, overflow of a body of water, or spray from any of these, all whether driven by wind or not.

Given Sandy's specific nature and the devastating force of the flooding it caused, the application of ACCC will be useful to many insurers to confront the cause of the property damage and to exclude much of it. However, enforcement of this relatively unknown exception (from a typical insured's perspective) will mostly likely result in litigation; the outcome of which will vary depending on the specificity and clarity of the ACCC and the ability of experts to determine and allocate the cause of the damage to either wind or water.

In New York and New Jersey, ACCC are treated differently (as they are throughout the United States) because insurance law, being mainly a creature of state statutes and case law, varies from state to state. Moreover, given the frequency of hurricanes and tropical storms in the South and Gulf Coast regions versus New York and New Jersey, ACCC have been more heavily litigated in the wind versus water context in the South and Gulf Coast states than in the Northeast. For example, in the South and Gulf Coast, insurers often enforce ACCC by only paying for wind damage that is above the watermark.

Given the scant amount of case law in New York and New Jersey addressing the applicability of ACCC in a situation like Sandy, it is important to look at the treatment of ACCC (and their enforceability) in the context of other types of property damage. In Kula v. State Farm Fire & Casualty Co.,<sup>xii</sup> the New York Court of Appeals was asked to interpret an ACCC in connection with an earth movement exclusion wherein the insured had suffered property damage when a ruptured water pipe caused the earth under the home to shift and/or sink. In granting summary judgment to the insurer, the court found the ACCC clearly excluded coverage for any loss from earth movement, when combined with water, regardless of the cause. The court further determined that New York had no legislation which would circumvent the application of the applicability of the ACCC.

In Reynolds v. Standard Fire Ins. Co.,<sup>xiii</sup> the court reversed the denial of an insurer's summary judgment motion, finding the ACCC controlling under either the insured's or insurer's theory of the cause of loss because the losses were due to oil damage caused indirectly by water. Given the clear and unambiguous ACCC provision, the court found any loss resulting directly or indirectly from water damage was excluded.

Similarly, in Casey v. General Accident Ins. Co.,<sup>xiv</sup> the appellate court reversed denial of an insurer's summary judgment motion, in light of the applicability of the ACCC. The court determined that, because all parties agreed the water (which ultimately entered plaintiff's home and caused damage) originated as natural precipitation in the form of a heavy rainstorm, this met the definition of "surface water" and the loss was excluded. Thus, should New York courts facing Sandy litigation follow these decisions, the result should be favorable to insurers where the cause of loss is either clearly attributable to water versus wind or where water is (at the very least) a contributing cause of the damage.

On the other hand, New Jersey courts seem hesitant to grant summary judgment to insurers when the cause of loss is not readily identifiable. In Assurance Co. of Am., Inc. v. Jay-Mar, Inc.,<sup>xv</sup> the U.S. District Court in New Jersey was asked to interpret a policy with an ACCC where the insured suffered a loss due to a disputed cause. The insured alleged the loss resulted solely from the backup of sewers and drains while the insurer alleged the loss resulted from flooding and surface waters. Based on this discrepancy, the court found the cause of loss needed to be determined by a jury. However, before denying the insurer's summary judgment motion, the court held the application of the ACCC was not against New Jersey's public policy despite the insured's allegations. Specifically, the court found that, although the New Jersey Supreme Court had not yet determined whether the occurrence of an excluded cause of loss simultaneously or sequentially with an included cause of loss bars an insured from recovery, New Jersey's lower courts had addressed both situations in Brindley v. Firemen's Ins. Co. of Newark.<sup>xvi</sup> In Brindley, it was determined that a "loss due to the

effect of causes both within and outside the coverage, operating conjointly, is generally considered not recoverable." Thus, the insured's argument in Jay-Mar was rejected. Given the nature of the damage caused by Sandy in New Jersey, especially at the New Jersey Shore where evidence of flood versus wind damage appears clear, New Jersey courts may be more inclined to grant summary judgment to insurers than in the past.

### **Applying the Water Exclusion and other potential exclusions in Sandy-related claims**

As damage from Superstorm Sandy was due to a combination of flooding and wind, it is important to examine how courts in New York and New Jersey have treated policy exclusions which may apply in Sandy-related claims.

**a. Water Exclusion** The water exclusion typically states there is no coverage where the cause of loss is due to "[f]lood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind." In E.B. Metal & Rubber Industries, Inc. v. Federal Ins. Co.,<sup>xvii</sup> a New York court granted the insurer summary judgment where the plaintiffs' property was damaged when a dike gave way and water inundated the property. Plaintiffs contended the loss was caused by improper construction and maintenance of the dike and alleged there was no proof the resulting flood was the prevailing cause of the loss. The court disagreed, finding that the water exclusion provision was clear and unambiguous, requiring only that there "be rising waters which break through boundaries and flow upon" an insured's land in order to constitute a flood. The court found it irrelevant that a defect in the dike could have contributed to the break.

Even where the loss can be attributable to more than one cause, New York courts still have applied the water exclusion strictly if the dominant cause of loss was water. In Kannatt v. Valley Forge Ins. Co.,<sup>xviii</sup> the plaintiffs' basement was flooded after a heavy rainstorm and their homeowner's policy contained the aforementioned water exclusion. The court granted summary judgment to the insurer as it was able to prove the dominant and proximate cause of the loss was water damage caused by surface water flowing into the basement. Similarly, in Wilner v Allstate Ins. Co.,<sup>xix</sup> a heavy rainstorm occurred resulting in an overflow of water from a clogged sewer drain manhole located on contiguous property uphill of the Plaintiffs' property. The concentrated flow of water from the clogged manhole caused the soil in the rear of Plaintiffs' property to slide downhill, causing damage. The New York court granted summary judgment to the insurer finding the rainwater itself, the immediate operative force causing the damage, was the proximate cause of the loss and thus it was unnecessary to look any further.

Unlike New York, New Jersey courts have not strictly applied this exclusion where the loss can be attributable to more than one cause. In Franklin Packaging Co. v. California Union Ins. Co.,<sup>xx</sup> the plaintiff's policy provided coverage for losses caused by vandalism and malicious mischief, but contained the water exclusion. Vandals broke into plaintiff's warehouse and broke a valve of the air conditioning system which flooded the premises because the vandals blocked the drainage pipe. The insurer moved for summary judgment on grounds the damage was caused by an excluded risk and the trial court granted the motion, however it was reversed on appeal. The appellate court disagreed with the trial court noting the case dealt with a sequence of events, the first being the insured risk of vandalism and the last being the blocked drain. The court determined

recovery was allowed because the insured peril was the proximate cause of the entire loss since it set into operation a chain of events which ultimately resulted in the excepted risk.

**b. Rain Exclusion** Courts have also strictly construed the rain exclusion, which excludes damage by rain unless the building first sustains damage by a covered cause of loss through which the rain enters. In Kennel Delites, Inc. v. T.L.S. N.Y. City Real Estate, LLC,<sup>xxi</sup> a New York court granted summary judgment to an insurer whose policy contained a rain exclusion, although the plaintiff contended the water damage to its interior was due to debris and mortar that fell from a neighboring building and clogged its roof drain, causing the rainwater to accumulate on its roof and enter plaintiff's building. The court found that because the rainwater was the "efficient physical cause," there was no reason to look further for alternate causes.

Similarly, in Grossberg v. Chubb Ins. Co.,<sup>xxii</sup> an unpublished New Jersey opinion (which is not precedent nor is binding upon a New Jersey appellate court), the court strictly construed a wind-driven rain exclusion and affirmed summary judgment for the insurer where deterioration and decay within plaintiffs' property occurred as a consequence of the structure's repeated exposure to wind-driven rain being forced behind the home's cedar siding. The court found it was clear that plaintiffs' premises were compromised by wood rot occasioned by wind-driven rain that could not otherwise escape from behind the cedar siding and thus, by the plain and unambiguous terms of the policy, the loss was excluded.

**c. Mold Exclusion** The potential applicability of mold exclusions must also be considered given the surprisingly rapid growth of mold documented in the affected areas immediately following the storm. New York's courts have previously held that the

“mold” exclusion is clear and unambiguous and plainly excludes coverage for “property damage” caused by mold, wet or dry rot. In Hritz v. Saco,<sup>xxiii</sup> the court granted summary judgment to an insurer where a claimed loss was excluded by the mold exclusion. The court found mold was specifically excluded by the policy and held any airborne mycotoxins released by the mold were also excluded from coverage since they were caused by mold and are a by-product of mold. Similarly, in Siegel v. Chubb Corp.,<sup>xxiv</sup> the court held the mold exclusion applied to a loss suffered by an insured when he was forced to vacate his condominium. In Roy v Encompass Insurance,<sup>xxv</sup> summary judgment was granted based upon the mold exclusion despite plaintiffs’ argument the damage to the property was due not to mold but to the negligent installation of the property’s roof. The court rejected this argument and found the loss was excluded because faulty, inadequate or defective workmanship, construction, and renovation were excluded by the policy, as well.<sup>xxvi</sup> Thus, it appears New York courts should continue to construe strictly the mold exclusion in the context of Sandy.

In New Jersey however, the mold exclusion has not been strictly construed. In Simonetti v. Selective Ins. Co.,<sup>xxvii</sup> the court reversed summary judgment to the insurer where the damage was attributable to a water leak caused by a rainstorm which caused mold throughout the plaintiff’s home. The court found that because a question of fact was presented as to whether some or all of the damage, including the mold, was caused by the rainstorm, summary judgment was inappropriate. The court remanded the case stating that if the plaintiff’s proved that the mold resulted from a covered peril, then the cost of removing the mold was not a loss separate from, or caused by, the mold itself, but rather was within the coverage provided under the policy.

**d. Faulty Workmanship and Maintenance Exclusion** The faulty workmanship and maintenance exclusion contained in many policies may also be applicable in many of the Sandy claims. The faulty workmanship and maintenance exclusion typically bars coverage for losses caused by faulty design, construction, repair, renovations, workmanship and/or maintenance. New York courts have strictly construed this exclusion. For example, in Wider v. Heritage Maintenance, Inc.,<sup>xxviii</sup> the court granted the insurer summary judgment where the insured's property was damaged due to the defective cleaning and restoration worked performed by a contractor on the façade and base of the building. The court found the faulty workmanship and maintenance exclusion was clear and unambiguous and applied to the process of doing the work, the finished product itself and the upkeep of a building or equipment. Therefore, in New York it appears the faulty workmanship and maintenance will be applicable for Sandy claims when coupled with an anti-concurrent-causation clause.

However, in New Jersey, the courts have been reluctant to strictly apply this exclusion. In Simonetti v. Selective Ins. Co.,<sup>xxix</sup> the court denied the insurer's summary judgment motion where the insured's property damage was attributable to mold and faulty design, workmanship and maintenance. The court found the lack of an anti-concurrent-causation clause in the faulty design, workmanship and maintenance exclusion significant in finding coverage for the loss. Further, it determined that where included and excluded causes occur concurrently, it is for the fact finder to determine for which cause the insured can recover.

In Spiniello Cos. v. Hartford Fire Ins. Co.,<sup>xxx</sup> the court denied the insurer's motion for summary judgment finding the faulty materials and ensuing loss provision ambiguous

because it appeared to provide coverage for losses even where the loss resulted from the use of defective materials. It was not persuaded by the insurer's argument that the ensuing loss provision applied only where a separate, independent covered event caused the damage and found the provision simply indicated that damage inflicted on property "other" than the defective property itself would be covered, whether or not some intervening event interceded.

### **Avoiding Bi-Economy/Panasia Estates damages on Sandy claims**

A pair of 2008 decisions by the New York Court of Appeals cleared the way for policyholders to recover consequential damages flowing from an insurer's breach of the duty of good faith implied in every property insurance contract. Bi-Economy Market, Inc. v. Harleysville Ins. Co., and a companion decision issued the same day, Panasia Estates, Inc. v. Hudson Ins. Co.,<sup>xxxix</sup> held that a policyholder may recover consequential damages where they are foreseeable and caused by the insurer's failure to adjust and pay a claim promptly. For insurers, such consequential damages claims create significant risks of exposure over and above policy limits. Superstorms like Sandy present special challenges to the insurance industry by overburdening insurers, adjusters and their agents. The expectations of insureds, governmental agencies and the Courts evidence the already great pressures brought on by the vast number of claims. Consequently, the following suggestions will be helpful in avoiding possible Bi-Economy/Panasia Estates claims:

- *Act in good faith.* While no simple formula can capture the concept completely, good faith includes acting honestly, openly and with proper motives. Consequential damages are often caused when the insured

cannot resume its normal business. Ask yourself whether your decisions will increase the insured's loss.

- *Insist that adjusters conduct their investigations promptly and follow insurer guidelines.* Remember that, while the adjuster is investigating, the insured may be losing income that it will try to recover. Be vigilant that no claims are being left unattended. Hold the adjuster to any applicable standards, especially those created by the insurer itself.
- *Communicate with the insured and respond to its inquiries.* Clear, prompt communication with the insured will speed the process and help the insurer understand mounting risk of extra costs, or lost income or business opportunity.
- *Control internal delays.* Ordinary lines of authority or other processes and procedures may add unnecessary time to the claim process. Consider whether the volume of Sandy-related claims make it necessary to modify and accelerate processes and procedures.
- *Engage experts promptly.* Sandy may present a number of unusual situations. Experts in many areas will be in great demand. Be ready to bring consult with appropriate causation and valuation at the earliest possible point, both to speed the handling of the claim and to avoid unnecessary delays in reserving their services later.
- *Make reasonable advances and pay undisputed partial amounts.* All sides will want to adjust a claim with a final undisputed amount. Since that may not be possible under the conditions created by Sandy, insureds may

depend upon partial payments. While there may be good faith disputes over significant parts of the claim, but paying undisputed amounts promptly can reduce the likelihood of complaints being filed with the respective states' insurance departments and, if litigation ensues, the peril of contesting an extra-contractual loss.

## **Conclusion**

The unique scope and magnitude of damage caused by Superstorm Sandy has created an environment where customary application of insurance regulation and claims analysis is being modified almost weekly, placing great stress on the property insurance industry. Only days after the storm, government officials in New York and New Jersey introduced a number of changes intended to streamline the claims adjustment process and place insurance proceeds in the hands of policy holders. In New York, Governor Cuomo immediately directed the Superintendent of Financial Services to place a 30 day moratorium (since extended) on the “termination, cancellation, or non-renewal of any ‘covered policy’” in the five boroughs of New York City, Nassau, Suffolk, Westchester, Rockland and Orange counties; to require insurers to accept homeowner’s documentation, including photos and video, in lieu of on-site inspections; and that hurricane deductibles will not be enforceable against policyholders in the effected areas. The Governor also directed the Superintendent of Financial Services to issue a new departmental regulation cutting by more than half the time (from 15 days to six) that insurers have to send adjusters to homes and businesses to inspect damage caused by Sandy; permitting expedited temporary licenses to qualified out-of-state public adjusters;

and establishing a “report card” system to assess the performance of insurance companies in responding to and paying claims stemming from the storm.

These and other modifications to insurance department regulations will require vigilance on the part of insurers during these difficult times. To keep abreast of these changes and for additional information or assistance, contact Michael Gorelick, Glenn Jacobson or Gabrielle Puchalsky-Elfand at Abrams, Gorelick, Friedman and Jacobson, LLP.

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- <sup>i</sup> See Rousseau, “FM Global’s Lou Gritzko Discusses Sandy Impact”, at <[PropertyCasualty360.com](http://PropertyCasualty360.com)>.
- <sup>ii</sup> See Rice, “Business Interruption coverage in the Wake of Katrina: Measuring the Insured’s Loss in a Volatile Economy”; Tort Trial & Insurance Practice Law Journal, Spring 2006 (41:3).
- <sup>iii</sup> See, Zurich American Ins. Co. v. ABM Industries, Inc., 265 F.Supp.2d 302 (S.D.N.Y. 2003); Lava Trading Inc. v. Hartford Fire Ins. Co., 365 F.Supp.2d 434 (S.D.N.Y. 2005); Schlamm Stone & Dolan, LLP v. Seneca Ins. Co., 6 Misc.2d 1037(A), 800 N.Y.S.2d 356 (Sup.Ct. 2005).
- <sup>iv</sup> 33 A.D.3d 392, 822 N.Y.S.2d 268 (1<sup>st</sup> Dep’t 2006)
- <sup>v</sup> N.Y.L.J. Dec. 19, 2006 (1<sup>st</sup> Dep’t 2006)
- <sup>vi</sup> See Abner, Herrman & Brock Inc. v. Great Northern Ins. Co., 308 F.Supp.2d 331 (S.D.N.Y. 2004).
- <sup>vii</sup> 308 F.Supp.2d 331 (S.D.N.Y. 2004).
- <sup>viii</sup> 385 F.Supp.2d 280 (S.D.N.Y. 2005).
- <sup>ix</sup> See Broad Street, LLC v. Gulf Ins. Co., ; Duane Reade Inc v. St. Paul Fire and Marine Insurance Co., 441 F.3d 383 (2d Cir. 2005).
- <sup>x</sup> See Streamline Capital, L.L.C. v. Hartford Cas. Ins. Co., 2003 WL 22004888 (S.D.N.Y. 2003).
- <sup>xi</sup> See Admiral Indemnity Co. v. Bouley International Holding, LLC, 2003 WL 22682273 (S.D.N.Y. Nov. 13, 2003).
- <sup>xii</sup> 212 A.D.2d 16, 628 N.Y.S.2d 988 (4th Dep’t 1995).
- <sup>xiii</sup> 221 A.D.2d 616, 634 N.Y.S.2d 163 (2d Dep’t 1995).
- <sup>xiv</sup> 178 A.D.2d 1001, 578 N.Y.S.2d 337 (4th Dep’t 1991).
- <sup>xv</sup> 38 F. Supp. 2d 349 (D.N.J. 1999).
- <sup>xvi</sup> 35 N.J. Super. 1, 113 A.2d 53 (App. Div. 1955).
- <sup>xvii</sup> 84 A.D.2d 662, 444 N.Y.S.2d 321 (3d Dep’t 1981).
- <sup>xviii</sup> 228 A.D.2d 564, 644 N.Y.S.2d 530 (2d Dep’t 1996).
- <sup>xix</sup> 2011 N.Y. Misc. LEXIS 1424 (Sup. Ct. 2011) affirmed by Wilner v Allstate Ins. Co., 2012 N.Y. App. Div. LEXIS 6534 (2d Dep’t Oct. 3, 2012).
- <sup>xx</sup> 171 N.J. Super. 188, 408 A.2d 448 (Sup. Ct. App. Div. 1979).

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- <sup>xxi</sup> 49 A.D.3d 302, 852 N.Y.S.2d 130 (1st Dep't 2008).
- <sup>xxii</sup> 2012 N.J. Super. Unpub. LEXIS 1981 (App. Div. Aug. 20, 2012).
- <sup>xxiii</sup> 18 A.D.3d 377, 795 N.Y.S.2d 236 (1<sup>st</sup> Dep't 2005).
- <sup>xxiv</sup> 33 A.D.3d 565, 825 N.Y.S.2d 441 (1<sup>st</sup> Dep't 2006).
- <sup>xxv</sup> 2008 NY Slip Op 30487U (Sup. Ct. 2008).
- <sup>xxvi</sup> See also Bd. of Educ. of the Liverpool Cent. School Dist. v. Utica Mut. Ins. Co.
- <sup>xxvii</sup> 372 N.J. Super. 421, 859 A.2d 694 (App. Div. 2004).
- <sup>xxviii</sup> 14 Misc. 3d 963, 827 N.Y.S.2d 837 (Sup. Ct. 2007).
- <sup>xxix</sup> 372 N.J. Super. 421, 859 A.2d 694 (App. Div. 2004).
- <sup>xxx</sup> 2008 U.S. Dist. LEXIS 95009 (D.N.J. Nov. 21, 2008).
- <sup>xxxi</sup> 886 N.E.2d 127 (N.Y. 2008), 886 N.E.2d 135 (N.Y. 2008).